No. 96-663 (4)

In The

Supreme Court of the United States

October Term, 1996

MARVIN KLEHR and MARY KLEHR,

Petitioners,

vs.

A.O. SMITH CORPORATION and A.O. SMITH HARVESTORE PRODUCTS, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When does Petitioners' civil RICO claim accrue for purposes of the statute of limitations where Respondents continue to commit predicate acts which cause Petitioners additional, continuous, or accumulating injuries to their business or property within four years of bringing suit?

2. Did Respondents engage in fraudulent conduct that was self-concealing and/or subsequent acts of active concealment so as to suspend the running of the statute of limitations for Petitioners' civil RICO action under the doctrines of equitable tolling and/or fraudulent concealment?

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

NASCAT is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee benefit, environmental, pension and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud and so-called "while collar" criminal activity. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful, fraudulent, deceptive and manipulative business practices.

NASCAT and its members have a profound interest in the scope and bases of civil liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968. NASCAT's members have represented the victims of fraudulent schemes and so-called "white collar" crime in many significant civil RICO actions filed, litigated, tried and/or settled in recent years, including *In re American Continental Corp./ Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992); *In re Crazy Eddie Sec. Litig.*, 812 F. Supp. 338 (E.D.N.Y. 1993); *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960 (C.D. Cal. 1994); and *In re Prudential Sec., Inc. Sec. Litig.*, 930 F. Supp. 68 (S.D.N.Y. 1996). Because of their years of experience representing the victims of fraudulent schemes in civil RICO actions, NASCAT's members can offer a helpful perspective to this Court in evaluating the arguments made by Petitioners and Respondents in this case, which concerns the appropriate accrual rule for the four-year statute of limitations governing civil RICO

actions, as well as the application of the fraudulent concealment and equitable tolling doctrines in such cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court's decision in *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) ("*Malley-Duff*"), which held that a four-year limitations period borrowed from federal antitrust law governs civil actions brought under § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the courts have adopted conflicting rules governing *when* civil RICO actions *accrue*. This Court should adopt a uniform rule of accrual and NASCAT submits that the "last predicate act" rule elucidated in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3d Cir. 1988) should be followed.

In *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946), Justice Frankfurter stated that the equitable doctrine of fraudulent concealment "is read into every federal statute of limitations." While courts have found this doctrine applicable in antitrust cases, *see Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978), securities fraud cases, *see Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000, 1002 (7th Cir. 1984), as well as in civil RICO cases, *see McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992), the decisions of the courts below (as well as decisions rendered in other circuits) demonstrate that the parameters of applicable tolling doctrine(s) in civil RICO cases require elucidation by this Court.[1]

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[1] *See Klehr v. A.O. Smith Corp.*, 875 F. Supp. 1342, 1352 n.6 (D. Minn. 1995) (entering summary judgment for defendant because they "did not conceal the facts constituting the cause of action"), *aff'd*, 87 F.3d 231, 239 n.11 (8th Cir. 1996) ("We reject the Klehrs' argument that federal equitable tolling principles save their claim from being barred by the statute of limitations."), *cert. granted*, 117 S. Ct. 725 (1997).

I. ARGUMENT

A. Given The Conflicting Rules Adopted By The Circuit Courts Following This Court's Decision In *Malley-Duff*, It Is Appropriate For This Court To Elucidate A Uniform Rule Of Accrual For Civil RICO Actions

When Congress enacted RICO in 1970, it failed to institute a specific limitations period for civil actions, notwithstanding the well-recognized need for a statute of limitations. *See Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations."). In *civil* RICO cases, the applicable limitations period remained unsettled until *Malley-Duff*, which held that a uniform four-year period borrowed from the Clayton Act would be the applicable period for civil RICO claims. 483 U.S. at 156.[2] This Court, however, expressly refused to reach the question of *when* civil RICO claims accrue. *Id.* at 156-57.[3]

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[2] *See generally* Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. Pa. L. Rev. 1447 (1987) (discussing *Malley-Duff* in the context of federal jurisprudence on statutes of limitations); *see also Special Project – Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1084-94 (1980) (discussing qualifications to time bars, including accrual and tolling doctrines).

[3] "Accrual" refers to the point at which a cause of action may be maintained. Black's Law Dictionary 20-21 (6th ed. 1990). The start of a limitations period and the accrual of a cause of action are terms that are often used synonymously by many courts. *See Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."); *United States v. Kubrick*, 444 U.S. 111, 122

In the wake of *Malley-Duff*, the circuits have split on the question of *when* the four-year limitations period begins to run in a civil RICO action and, several differing theories of accrual have been elucidated. *See Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.) (collecting cases), *cert. granted*, 116 S. Ct. 2521 (1996), *cert. dismissed*, No. 95-1722 (Jan. 14, 1997); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152 (8th Cir. 1991) (describing "smorgasbord of civil RICO accrual rules" from which to select most appropriate rule).[4] While there is some common ground because each circuit has "incorporated the principle of discovery into the accrual rule governing civil RICO actions in the particular circuit," *id.* at 153, the circuits disagree about "what the plaintiff must actually or constructively know before the limitations period will start to run." *Id.* The existing rules provide widely varying periods of time

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(1979) (under Federal Tort Claims Act, cause of action has accrued if "a plaintiff [is] in possession of the critical facts *that he has been hurt and [knows] who has inflicted the injury*") (emphasis added); *id.* at 126 (Stevens, Brennan & Marshall, JJ., dissenting); *but see Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987) (in cases where *fraud* is alleged, claim accrues when plaintiff suffers injury, but statute of limitations does not run until claim is *discovered*). *Federal* law governs when civil RICO claims accrue. *See Cope v. Anderson*, 331 U.S. 461, 464 (1947).

[4] For commentary on the various accrual rules and their ramifications in civil RICO litigation, *see* G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability*, 33 Am. Crim. L. Rev. 1345 (1996); Douglas E. Abrams, *The Law of Civil RICO* § 2.4 (Little Brown & Co. 1991 & Cum. Supp. 1996) ("*Civil RICO*"); Paul B. O'Neill, *"Mother of Mercy, Is This the Beginning of RICO?": The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172 (1990) ("*Proper Point of Accrual*"); Mary S. Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990) ("*Uniform Rule of Accrual*"); Edwin Scott Hackenberg, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 La. L. Rev. 1411 (1988) ("*Accrual of Civil RICO Claims*").

within which an injured person may investigate and bring a civil RICO action. NASCAT submits that this Court should adopt a uniform rule governing such actions. Although the majority of the courts have adopted "injury discovery" and "injury and pattern discovery" rules, *see* Part III.B, *infra*, given their inherent limitations this Court should follow the "last predicate act" accrual rule announced by the Third Circuit in *Keystone*, 863 F.2d at 1130-33, because it fulfills the public policies underlying RICO and correctly characterizes a civil RICO action as a remedy designed to compensate victims and punish perpetrators of a *continuing* violation of federal and/or state law. *See* Part III.C, *infra*.

B. While The Majority Of The Circuit Courts Have Adopted The So-Called "Injury Discovery" And "Injury And Pattern Discovery" Rules, Their Inherent Limitations Weigh Against Their Adoption By This Court

The First, Second, Fourth, Fifth, Seventh, Ninth and D.C. Circuits employ an *injury*-based accrual rule, holding that a civil RICO action accrues at the time plaintiff *discovered* or should have discovered his, her, or its *injury*. *See Grimmett*, 75 F.3d at 511 (" 'The limitations period [for civil RICO actions] begins to run when a plaintiff knows or should know of the injury which is the basis for the action.' ") (citation omitted).[5] Under this rule, however, a

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[5] *Accord Rodriguez v. Banco Cent.*, 917 F.2d 664, 665 (1st Cir. 1990) (Breyer, Ch.J.) ("[T]he statute begins to run when a plaintiff discovered, or should have discovered, his injury."); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988) (same); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (RICO's limitations period "begins to run when a plaintiff knows or should know of the injury that underlies his cause of action."); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool*, 972 F.2d at 1464-65; *Volk*, 816 F.2d at 1415; *Riddell v. Riddell Washington*

RICO plaintiff "need not discover that the injury is part of a 'pattern of racketeering' for the period to begin to run." *Grimmett*, 75 F.3d at 510 (quoting *McCool*, 972 F.2d at 1465).

The potential injustice of the "injury discovery" rule may be illustrated by a simple hypothetical: Suppose plaintiff suffers an injury to his business or property in 1990 when defendant commits an illegal act which constitutes a predicate act of "racketeering activity."[6] Assume that plaintiff *discovers* that injury to his business or property in 1994. Although injured, where the "injury discovery" rule is followed, plaintiff cannot bring a civil RICO action at this point because there is as yet no "pattern of racketeering activity" that can be properly alleged; even under the most liberal interpretation of the pattern requirement, *two* predicate acts are necessary.[7] Assume

Corp., 866 F.2d 1480, 1489-90 (D.C. Cir. 1989); *see also* Abrams, *Civil RICO* § 2.4, at 61 ("A civil RICO claim accrues when the plaintiff discovered or had reason to discover the proprietary injury that is the basis of the claim.") (footnotes and citations omitted).

[6] *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to include such offenses as bribery, arson, extortion, and threats to commit any of the above, as well as other activities already criminalized elsewhere in the U.S. Code, such as mail fraud, wire fraud, interstate transportation of stolen property, embezzlement and bankruptcy fraud).

[7] *See* 18 U.S.C. § 1961(5) (defining "pattern of racketeering activity"); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) ("[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity."); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) ("It is the factor of *continuity plus relationship* which combines to produce a pattern. . . . '[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing

further that plaintiff sustains *another injury* to his business or property caused by another predicate act committed by defendant; plaintiff discovers the *second* injury in 2000 and then files a civil RICO action. Under the "injury discovery" accrual rule, plaintiff would be unable to recover in that action for the 1994 injury, even though he sustained two injuries caused by predicate acts of racketeering occurring within ten years of each other, the baseline requirement for a civil RICO claim. Courts applying this accrual rule would hold that the 1994 discovery triggered the four-year limitations period, so plaintiff's civil RICO claim became time-barred in 1998, before he could even allege a pattern of racketeering activity that included the second predicate act and resulting injury. *See State Farm Mut. Auto Ins. Co. v. Ammann*, 828 F.2d 4, 4-5 (9th Cir. 1987). As a result, the "injury discovery" rule has been subject to well-justified criticism,[8] and there is no compelling reason why such a restrictive accrual rule should be adopted by this Court.

characteristics and are not isolated events.' ") (emphasis in original, citation omitted).

[8] *See* O'Neill, *Proper Point of Accrual*, 65 N.Y.U. L. Rev. at 205-06 ("[U]nder the discovery rule it is possible that a plaintiff could discover an injury caused by a defendant's racketeering act and have the statute of limitations run on that injury prior to the time of the commission of the second predicate act necessary to perfect plaintiff's right to relief under the statute. The RICO plaintiff might have part of his cause of action barred before he ever has the opportunity to sue.") (footnote omitted); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1410 (noting that the "injury discovery" accrual rule "may clash with the pattern [of racketeering activity] requirement" because "[i]f the claim accrues after the first injury but before the plaintiff can state a pattern, plaintiff may be time barred before he can state a claim. . . . Because of this defect, the discovery rule cannot be reconciled completely with the pattern requirement of RICO and is therefore not the best accrual rule for RICO actions.") (footnote omitted).

The rule followed in the Third, Eighth, Tenth and Eleventh Circuits applies the general discovery rule to *both* the "pattern" *and* "injury" elements of the civil RICO cause of action. As the court below stated: "This circuit employs a discovery accrual standard to civil RICO claims; under this standard, such an action begins to accrue *'as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.'* " 87 F.3d at 238 (emphasis added, citation omitted). In the words of the Eleventh Circuit:

> [W]ith respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, *both the existence and source of his injury and that the injury is part of a pattern*. . . . Because a civil RICO plaintiff must prove that his injury is part of a pattern of racketeering activity, an injured party must know, or have reason to know, that his injury is part of a pattern before he can be expected to file a civil RICO cause of action.

Bivens Gardens Office Bldg. v. Barnett Bank, 906 F.2d 1546, 1554-55 (11th Cir. 1990) (emphasis added).

Muddying the rough distinction between these accrual rules (*i.e.*, injury-based accrual *versus* injury-and pattern-based accrual) is the fact that courts in both groups utilize a "separate accrual" rule.[9] Application of

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[9] In his concurrence in *State Farm*, 828 F.2d at 5, then-Judge Kennedy first applied the "separate accrual" rule in the RICO context:

> The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and the other acts were committed outside the limitations period. A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period.

Id. (citations omitted). To date, some form of the "separate accrual" rule has been adopted by the First, Second, Seventh, Eighth, Tenth and Eleventh Circuits. *See, e.g., Rodriguez*, 917 F.2d at 666; *Bankers Trust*, 859 F.2d at 1102; *McCool*, 972 F.2d at 1464-66; *Granite Falls*, 924 F.2d at 154; *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens*, 906 F.2d at 1554-55; *see also Grimmett*, 75 F.3d at 510-11 (collecting cases); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1411-13.

this doctrine was illustrated in *Bankers Trust*, where the plaintiff bank alleged that the defendant officers of a bankrupt corporation: (1) wrongfully concealed assets during a 1974-76 bankruptcy proceeding; (2) conducted harassing lawsuits in 1978-79 to prevent plaintiff from vacating the fraudulently obtained bankruptcy plan; and (3) fraudulently conveyed property in 1981. 859 F.2d at 1098-99. The bank incurred various legal fees and expenses over time, besides the loss of the underlying debt.[10] Observing that in enacting RICO, Congress had in mind the possibility of "multiple and independent [injuries] that occur over a broad span of time," the Second Circuit held that a rule permitting a new cause of action to accrue with each such injury was "[t]he logical end result." *Id.* at 1103. The court adopted the separate accrual rule and found that the final two injuries were

[10] In *Bankers Trust*, the court held that the bank's claim for some of the damages caused by defendants' fraud was too speculative and, therefore, unrecoverable. Because the bankruptcy proceeding was not yet concluded, it was not clear what proportion of its loss the bank would ultimately recover. Its injury, therefore, could not yet be determined. As a result, the nature and amount of its damages was unprovable and, even though the fraud had occurred in 1974, the bank's cause of action for these damages had yet to accrue in 1988. 859 F.2d at 1106.

"independent" of the first and, therefore, not time-barred. *Id.* at 1102-05.[11]

Another version of the "separate accrual" rule was recognized in *Bivens Gardens*, where defendants were accused of committing three sets of predicate *acts*: (1) a wrongful takeover of a limited partnership in 1975; (2) mismanagement and diversion of the partnership's assets from 1975 to 1981; and (3) sale of a hotel, the partnership's primary asset, at below fair market value in 1981. 906 F.2d at 1549-51. The Eleventh Circuit held that the mismanagement and subsequent sale of the hotel were "new and independent" *acts* because they "[were] not included among the injuries that naturally flow from the wrongful takeover [in 1975]." 906 F.2d at 1551. Therefore, the "separate accrual" rule includes *both* further *predicate acts* committed by defendant and further *injuries* sustained by plaintiff:

> *if further predicate acts occur* that are part of the same pattern of racketeering, *regardless of whether they injure the plaintiff, or* if the plaintiff suffers *further injury* from a predicate act that is part of the same pattern of racketeering, even if that predicate act occurred outside the limitations period, *the statute of limitations begins to run*

[11] A necessary corollary of the separate accrual rule is that plaintiff may only recover for injuries discovered (or discoverable) within four years of the time when suit is brought. *See Bankers Trust*, 859 F.2d at 1104-05. "As long as separate and independent injuries continue to flow from the underlying RICO violations – regardless of when those violations occurred – plaintiff may wait indefinitely to sue, but may then win compensation only for injuries discovered or discoverable within the four-year 'window' before suit was filed, together, of course, with any provable future damages." *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1418 (1996) (citing *Bankers Trust*, 859 F.2d at 1103). *See also Cruden v. Bank of New York*, 957 F.2d 961, 977 (2d Cir. 1992); *In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1116-19 (S.D.N.Y. 1993).

> *from the date that the plaintiff knew or should have known of the last such act or the last such injury.*

Davis v. Grusemeyer, 996 F.2d 617, 623 (3d Cir. 1993) (emphasis added) (citing *Keystone*, 863 F.2d at 1126).[12] In application, however, courts have required RICO plaintiffs to allege and prove "new," "independent," or "distinct" *injuries*, rather than recognize that further predicate *acts* committed by defendant revive a RICO cause of action, if they are part of the same pattern. The court below ignored Petitioners' allegations of a *continuing* pattern of racketeering activity committed by defendants, holding that "continuing damage" sustained by Petitioners "into the limitations period through the continued use, operation, and repair of the Harvestore silo" did not revive their civil RICO claims, and stating that "these separate, discrete 'injuries' that the Klehrs identify are more appropriately categorized as one single, continuous injury that was sustained sometime in the 1970s and for which the limitations period commenced long before August 27, 1989." 87 F.3d at 239 (citing *Glessner v. Kenny*,

[12] In *McCool*, the Seventh Circuit misstated this doctrine, emphasizing that "[u]nder a separate accrual rule, a new cause of action accrues only when there is a new instance of wrongful conduct *and* a new injury." 972 F.2d at 1465 n.10 (emphasis in original). In *Malley-Duff*, 483 U.S. at 150, this Court stated that the Clayton Act provides the closest analogy to RICO and, while actions brought under the Clayton or Sherman Acts do not require a "pattern," antitrust law recognizes the ongoing nature of antitrust violations. While an antitrust violation normally accrues when defendant commits an act that injures plaintiff's business, *see Zenith Radio*, 401 U.S. at 338, courts have carved out an exception to this accrual rule in the case of a *continuing* violation. *See Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 495 (1968). *Each violative act triggers a new limitations period and plaintiff may recover damages for those acts that occurred in the four years immediately preceding the filing of the claim. Zenith Radio*, 401 U.S. at 338; *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300 (9th Cir. 1986).

952 F.2d 702, 708 (3d Cir. 1991)). The court below misunderstood or deliberately misapplied the separate accrual doctrine.[13]

The vagaries of the "injury and pattern discovery" rule and/or the "separate accrual" rule invariably mean that meritorious plaintiffs' RICO claims are unjustifiably time-barred. The factual variations evident in civil RICO litigation demonstrate the need for this Court to adopt a rule of accrual that takes into account the multiple (and analytically complex) injuries often present in such cases. It is the unusual case where plaintiff sustains only a "single" (albeit economically significant) injury from defendants' course of illegal conduct, such as *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992), a securities fraud/civil RICO

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[13] The Eighth Circuit's reliance upon the Third Circuit's decision in *Glessner* was misplaced. In that case, plaintiffs brought their RICO actions in 1988 after defendants had ceased production of an allegedly defective furnace in 1983, *thus ending the pattern of racketeering activity*. Appealing dismissal of their RICO claims, plaintiffs argued that although they first suffered injury, in the form of excessive repairs, prior to the expiration of the four-year limitations period, they suffered a "new and independent injury" in 1984 when they had to replace the furnace; this new injury, they claimed, reset the statute of limitations. 952 F.2d at 706-07. The Third Circuit found that plaintiffs' replacement of the furnace did not constitute a new and distinct injury but, rather, a continuation of their initial injury and concluded that "the mere continuation of damages into a later period will not serve to extend the statute of limitations." *Id.* at 708. However, *Glessner* is distinguishable because plaintiffs there *did not allege further predicate acts*; in this case, Petitioners' complaint details an undisputed pattern of racketeering activity lasting until the Spring of 1991, nearly 17 years after they originally purchased the Harvestore. Whether or not those further predicate acts injured Petitioners (and their complaint and expert witness damage analysis say that they did), does not matter under the correct application of the "separate accrual" rule.

class action brought on behalf of 23,000 defrauded investors who lost hundreds of millions of dollars when worthless subordinated debentures went into default; plaintiffs were injured only once by the alleged pattern of racketeering activity and their claims accrued on the same date.[14] In other cases, such as *In re Prudential Sec. Ltd. Partnerships Litig.*, 930 F. Supp. 68 (S.D.N.Y. 1996) a securities fraud/civil RICO class action brought on behalf of more than 100,000 investors who lost hundreds of millions of dollars when they were fraudulently induced to invest in limited partnerships worth substantially less than represented by the promoters, the existence of multiple injuries resulting from virtually innumerable predicate acts complicates the accrual question.[15] The four-year

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[14] As the Third Circuit stated in *Keystone*, 863 F.2d at 1133, "[t]he [injury discovery accrual] rule is an effective rule where the facts indicate that there was one victim and each element and all predicate acts of a RICO violation were present at the same time."

[15] In *Prudential Sec.*, 930 F. Supp. 68, plaintiffs and the members of the class invested in six different (but related) limited partnerships formed between 1985 and 1991. Applying the discovery rule followed in the Second Circuit, Senior Judge Pollack analyzed the accrual of the investors' civil RICO claims:

> The statute of limitations did not begin to run on the date that investors received prospectuses in the limited partnerships, but at the date investors were in possession of sufficient information to suggest the probability of fraud. This did not occur until, at earliest, October, 1990, when capital losses were first suffered as a result of the sale of Polaris aircraft. Indeed, the record currently before the Court contains no indication that investors even learned of these capital losses until January of 1992, when the format of Prudential's monthly statements was altered so that the value of investments was no longer recorded at par. Thus, it cannot be determined . . . as a matter of law that investors in any of the Polaris limited partnerships were on notice of their injuries at a point

period begins to run on each injury when it is discovered, but application of the discovery rule in the multiple injury case results in a divisible cause of action, making it likely that plaintiff's claim may be partially barred by the statute of limitations when he has suffered multiple injuries arising from multiple predicate acts extending over a period of time.

C. This Court Should Adopt The "Last Predicate Act" Accrual Rule Followed By The Third Circuit In *Keystone*

The Third Circuit was the first circuit to depart from the injury-based accrual civil RICO rules and apply discovery principles to the *pattern of racketeering activity* element of a RICO cause of action. The "last predicate act" rule states:

> The limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed, *unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur . . . in that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same "pattern."*
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> * * *
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> If the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by the other predicate acts which occurred outside an earlier

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four years prior to the filing of this suit on June 8, 1994.

930 F. Supp. at 76-77.

> limitations period but which are part of the same "pattern."

863 F.2d at 1126, 1130-31 (emphasis added). In *Keystone*, an insurance company that was one of several companies defrauded by defendant's pattern of defrauding insurers alleged an ongoing pattern of racketeering activity which continued at least until September 1983, when an act of mail fraud was committed for which defendants were criminally convicted and sentenced in 1986. Plaintiff filed its RICO claim one month later, in July 1986. *Id.* at 1127. Reversing the district court's decision, which had ruled the claim untimely under a "last injury discovery" rule, the Third Circuit held that the RICO claim was timely filed under the "last predicate act" accrual rule because the insurer alleged that it discovered that defendant had committed a predicate act against one of the other insurance company victims within the past four years. After carefully examining RICO's express purpose, statutory language and legislative history, as well as the elements and injury requirement of a civil RICO action, *id.* at 1127-33,[16] *Keystone* correctly recognizes that "the essential problem" with the so-called "injury-based" civil RICO accrual rules

> lies in the fact that RICO is a crime of association, which is violated, *inter alia*, by "any person . . . associated with any enterprise . . . the activities of which affect . . . commerce, conduct[ing] . . . [the] enterprise's affairs through a

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[16] In *Keystone*, the plaintiff insurer was not injured by *every* predicate act that constituted the alleged pattern of racketeering activity; defendant had engaged in a pattern of defrauding numerous insurance companies. The Third Circuit held that plaintiff's RICO claim was not time-barred because the last predicate act, which did not injure plaintiff, was part of the *pattern* that injured plaintiff and fell within the limitations period. 863 F.2d at 1130. Likewise, for purposes of RICO standing this Court has recognized that a plaintiff need *not* be injured by *every* predicate act. *Sedima*, 473 U.S. at 495.

> pattern of racketeering." 18 U.S.C. § 1962(c). Therefore the discovery rule must apply to the pattern element as well as the injury element. If the plaintiff does not discover until, for example, five years after the first injury to that plaintiff, that the injury or injuries were part of a pattern of racketeering, then that plaintiff could not bring a successful civil RICO action using the last injury discovery rule. Thus, the last injury discovery rule would not effectively fulfill the purpose of the statute where predicate acts which are part of the same "pattern" and which do not injure the plaintiff occur after the last injury to the plaintiff.

Id. at 1129-30.[17]

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[17] *See also Greenberg v. Tomlin*, 816 F. Supp. 1039, 1051 (E.D. Pa. 1993) (plaintiff's RICO limitations period "must be measured from the time it knew or should have known of the pattern of racketeering activity" because if the plaintiff's "knowledge of injury arises solely from a single predicate act," it will have "discovered the injury but not the pattern"); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1415-16 (explicating *Keystone* rule); O'Neill, *Proper Point of Accrual*, 65 N.Y.U. L. Rev. at 218-20 (same). Although the *Keystone* accrual rule appears more liberal than the injury-based or injury- and pattern-based accrual rules, courts have not hesitated to dismiss civil RICO claims which were not timely brought. *See, e.g., Arab African Int'l Bank v. Epstein*, 10 F.3d 168, 174-75 (3d Cir. 1993) (rejecting proposed RICO amendment to complaint as untimely); *Fineberg v. Credit Int'l Bancshares*, 857 F. Supp. 338, 349 (D. Del. 1994) (predicate acts that allegedly prolonged limitations period were not "related to" and in "continuity with" pattern of racketeering activity alleged by plaintiff); *Owens v. Wade*, 789 F. Supp. 168, 172-75 (E.D. Pa. 1992) (same); *Korman v. Trusthouse Forte PLC*, 786 F. Supp. 458, 462-66 (E.D. Pa. 1992) (same); *Panna v. Firstrust Sav. Bank*, 749 F. Supp. 1372, 1377-78 (D.N.J. 1990) (applying *Keystone* and finding civil RICO claims time-barred), *vacated on reconsideration*, 760 F. Supp. 432, 437-38 (D.N.J. 1991) (applying *Keystone* and finding RICO claims timely).

Recognizing that "[t]he primary source of RICO's unique character is its pattern requirement," *Granite Falls*, 924 F.2d at 153, three circuits have followed *Keystone* in applying discovery principles to *both* the injury *and* pattern elements for accrual purposes. *See id.* at 154 (Eighth Circuit); *Bath*, 913 F.2d at 820 (Tenth Circuit); *Bivens Gardens*, 906 F.2d at 1553-54 (Eleventh Circuit). None of these courts, however, adopted the "last predicate act" discovery element of the *Keystone* accrual rule. In *Bivens Gardens*, the Eleventh Circuit sought to factually distinguish *Keystone* and incorporated a limiting "separate accrual" exception. 906 F.2d at 1554-55. In *Granite Falls*, the Eighth Circuit embraced the *Bivens Gardens* "separate accrual" rule, stating that it "better reflects the underlying policy of a statute of limitations requiring diligence on the part of the plaintiff than does the seemingly more open-ended rule fashioned by the Third Circuit in *Keystone*." 924 F.2d at 154.[18] In *Bath*, the Tenth Circuit adopted the *Bivens Gardens* rule without commenting on *Keystone*. 913 F.2d at 820.

The unique nature of a civil RICO cause of action, which requires allegation and proof of injuries caused by a pattern of racketeering activity, weighs strongly in favor of adoption of the "last predicate act" accrual rule for several reasons.[19] First, any accrual rule adopted *must*

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[18] In this case, the Eighth Circuit refused to revisit this issue and flatly rejected Petitioners' "request that we adopt the 'last predicate act' accrual rule outlined by the Third Circuit" in *Keystone*, "or a variation thereof." 87 F.3d at 239.

[19] Bolstering the determination that *Keystone* presents the appropriate civil RICO accrual rule is Congress's dictate that RICO "shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) (codified at 18 U.S.C. § 1961 note). *Sedima* made clear that this dictate, coupled with "Congress' self-consciously expansive language and overall approach" mandate that "RICO is to be read broadly." 473 U.S. at 497-98. *See Keystone*, 863 F.2d at 1131-32; O'Neill, *Proper Point of Accrual*,

be reconciled with § 1961(5) of RICO, which provides that a "pattern of racketeering activity" requires "at least two acts of racketeering activity . . . *the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.*" 18 U.S.C. § 1961(5) (emphasis added). *See H.J., Inc.*, 492 U.S. at 237 (observing that § 1961(5) "places an outer limit on the concept of a pattern of racketeering activity that is broad indeed"). *Keystone* acknowledged that "the accrual rule we fashion must take the specific language of the statute into account," 863 F.2d at 1132, because

> there is inherent in the statute a ten year limit on the point at which the last predicate act for purposes of accrual may occur. Congress in enacting the ten year limit must have envisioned causes of action which would involve patterns of racketeering extending over that period of time. It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries. *See* 18 U.S.C. § 1961(5), 1964(c).

Id. at 1132-33 (footnote omitted).[20]

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65 N.Y.U. L. Rev. at 220-25 (explicating public policies underlying RICO that favor *Keystone* rule).

[20] Given "the federal interest in providing relief to those who are injured by a course of continual and related conduct, it would be incongruous to bar, on statute of limitations grounds, recovery for predicate acts taking place outside the limitations period and permitting recovery only for those within the limitations period." *County of Cook v. Berger*, 648 F. Supp. 433, 435 (N.D. Ill. 1986). In that case, the district court determined

Of the several characterizations of the civil RICO claim that have been made, the most applicable is that of RICO as a *continuing* violation. In *Malley-Duff*, 483 U.S. at 150, this Court held that the Clayton Act "provides a far closer analogy" to RICO than any available state statute and, while actions brought under the Sherman or Clayton Acts do *not* require allegation and proof of a "pattern," federal antitrust law has recognized the *continuing* nature of antitrust violations.[21] *Keystone* relied on *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir. 1978), a criminal RICO case, where Judge Lasker explained:

> *[RICO] provides an example of a continuing offense for purposes of computing the time at which the statute of limitations begins to run.* The "nature of

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that since "it is the continuing nature of the violation that is the very essence of a RICO claim," *id.* at 434 n.1, the statute of limitations would run from the "last overt act" committed as part of the pattern, and Judge Kocoras rejected defendant's contention that the statute of limitations should run from the time when the County of Cook knew, or should have known, of its injury. *See* O'Neill, *Proper Point of Accrual*, 65 N.Y.U. L. Rev. at 217-18 (discussing "last-act" rule of accrual).

[21] *See Hanover Shoe*, 392 U.S. at 495 (affirming damages award based upon continuing violation of antitrust laws); *Hennegan*, 787 F.2d at 1300 (continuing violation occurs when plaintiff's interests are repeatedly invaded); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982) (explicating "continuing violation" and "continuing conspiracy" rules under Clayton Act); *see also* Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1408 (arguing that RICO's analogy to antitrust law "requires a hybrid rule of accrual which combines continuing violation principles with the discovery rule"). Under the "last predicate act" rule adopted in *Keystone*, plaintiff may recover damages for the entire pattern of RICO violations, even though some acts may have occurred outside the limitations period – more than four years later; the antitrust rule limits damages to those acts that occurred within the four years before the filing of the claim. *Id.* at 1413-14.

> the crime . . . is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115 (1970). The language of [RICO], which makes a pattern of conduct the essence of the crime, "clearly contemplates a prolonged course of conduct." *Id.* at 120. Like the statute of limitations for conspiracies, which runs from the date of the last overt act, *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957), the statute of limitations for violations of [RICO] runs from the date of the last alleged act of racketeering activity.

432 F. Supp. at 59 (emphasis added; parallel citations omitted). In *criminal* RICO cases brought under § 1962(c), the statute of limitations begins to run from the date of the *last predicate act* of racketeering activity, *see United States v. Torres Lopez*, 851 F.2d 520, 524-25 (1st Cir. 1988); on the other hand, in § 1962(a) prosecutions, the statute begins to run on the *last date of use or investment of income* derived from a pattern of racketeering activity, rather than on the date of the last predicate act of racketeering activity, *see United States v. Vogt*, 910 F.2d 1184, 1196 (4th Cir. 1990). *Keystone* stated that "[a]n interesting analogy to the ["last predicate act"] rule which we announce is the accrual rule in RICO criminal conspiracy cases," noting that in "§ 1962(d) conspiracy cases, no overt act need be proven." 863 F.2d at 1132. Therefore, "the statute of limitations in conspiracy cases where no overt act need be proven, such as a RICO conspiracy, does not run from commission of the last overt act; the conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor fully accomplished." *Id.*[22]

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[22] *See also United States v. Masters*, 924 F.2d 1362, 1368 (7th Cir. 1991) (statute of limitations for RICO conspiracy does not begin to run until accomplishment of or abandonment of conspiracy's objectives). Given the incidence of parallel civil RICO actions and criminal RICO cases (such as *ACC/Lincoln Savings* and the Government's RICO prosecution of notorious thrift operator Charles Keating), any accrual rule adopted by this Court in this case should consider (if not follow) the principles adhered to in criminal RICO cases.

With the exception of *Keystone*, the circuit courts have failed to reconcile their respective accrual rules with the RICO's statutory language. In *Rodriguez*, the First Circuit asserted that the *Keystone* accrual rule, when applied in conjunction with § 1961(5), could potentially allow an injured RICO plaintiff 14 years to bring suit. 917 F.2d at 664. Then-Chief Judge Breyer found this possibility "difficult to reconcile" with this Court's "determination that 'there is a need for a uniform statute of limitations for civil RICO' lest 'the memories of witnesses . . . fade[] or evidence [be] . . . lost.' " *Id.* (quoting *Malley-Duff*, 483 U.S. at 156). NASCAT respectfully submits that *Rodriguez* misapprehended *Malley-Duff* because the First Circuit voiced its concern over loss of evidence and witnesses' memories in response to Justice Scalia's dissenting opinion in *Malley-Duff*, which asserted that *no* statute of limitations should apply if state codes fail to furnish an appropriate limitations period. 483 U.S. at 155-56 (Scalia, J., dissenting). *Malley-Duff* answered the need for a uniform statute of limitations for civil RICO by establishing a four-year limitations period; however, this Court expressly reserved the limitations issue, thereby emphasizing the importance of separating these issues. *Id.* at 157. Additionally, the concern that an injured plaintiff might have 14 years in which to sue under RICO after defendants committed their first predicate criminal act against him ignores the fact that this right to sue only extends if the defendants *continue* to commit criminal acts against him (or other victims).[23]

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[23] The *Rodriguez* court concluded its criticism of the breadth accorded by § 1961(5) by stating that "[i]n any event, we do not know why a knowledgeable plaintiff should have [14], rather than four years to bring suit." 917 F.2d at 667. However, in the words of this Court, "this defect – if defect it is – is inherent in the statute as written, and its correction must lie with

D. Even If Petitioners' RICO Claim Accrued More Than Four Years Before They Filed Suit, Applicable Federal Tolling Doctrines Render Their Claim Timely

1. Introduction

If this Court adopts the "last predicate act" accrual rule, Petitioners' RICO claims are timely. Even if their claims are deemed to have accrued more that four years before they brought suit, however, the running of the statute of limitations should be arrested by application of two distinct tolling doctrines: Equitable estoppel (which includes fraudulent concealment) and equitable tolling. Both tolling doctrines are grafted onto federal statutes of limitations, *see Holmberg*, 327 U.S. at 397, including RICO, *see Grimmett*, 75 F.3d at 514 ("Equitable tolling doctrines, including fraudulent concealment, apply in civil RICO cases."). Unfortunately, these doctrines have generated a great deal of confusion in the lower federal court because courts and parties often mix them with each other and with accrual doctrines, such as the discovery rule. *See Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 851-52 (7th Cir. 1996).

The purpose of the discovery rule is to determine the accrual date of a claim in order to ascertain when the statute of limitations begins to run. Equitable estoppel and equitable tolling step in to toll, or stop, the statute from running because of equitable considerations. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-52 (7th Cir. 1990). Under the discovery rule, courts often find that the statute of limitations does not begin to run until the proposed plaintiff learns or should learn that he has been *injured*. *See Wolin*, 83 F.3d at 852 ("not that he has been

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Congress." *Sedima*, 473 U.S. at 499; *see also United States v. Thomas*, 991 F.2d 206, 215 (5th Cir. 1993) ("Actual or potential aberrant results, however, do not excuse reading (or writing) anything into or out of a statute that Congress has so consciously adopted.").

wronged, just that he has been injured"). When a potential plaintiff knows of an injury, but not that it was *wrongfully caused*, a tolling doctrine should suspend the statute's running. But simple knowledge of an injury might also result in a finding that the cause of action itself had not accrued until the potential plaintiff knew (or should have known) of both the injury *and* the wrongdoing.[24]

Fraudulent concealment, a branch of equitable estoppel, exists when the wrongdoer takes affirmative steps beyond the original wrongdoing to prevent or delay its discovery, and it encompasses wrongful acts that are "self-concealing" and acts of "active concealment."[25] Cases addressing "active concealment" and "self-concealing" wrongs often focus on a single wrongful episode; however, a pattern of racketeering activity may include wrongful acts which both conceal an original wrong and,

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[24] *See Bailey v. Glover*, 88 U.S. 342, 349 (1875) ("[W]e hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute *does not begin to run* until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.") (emphasis added); *Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1307-08 (9th Cir. 1992).

[25] Fraudulent concealment applies only to the latter, while the former is within the province of equitable tolling. An act is self-concealing if it was committed during the course of the original fraud and has the effect of concealing the fraud from its victim. Active concealment, on the other hand, involves acts intended to conceal the original fraud that are distinct from that original fraud. *See Wolin*, 83 F.3d at 851-852; *Sprint Communications Co. L.P. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996); *Martin v. Consultants & Administrators*, 966 F.2d 1078, 1094 n.17 (7th Cir. 1992); *see also Hobson v. Wilson*, 737 F.2d 1, 33 & n.102 (D.C. Cir. 1984) (theft of antique vase is complete once taken, while replacing it with fake rendition, whether immediately later, is distinct act of concealment).

at the same time, establish elements of the violation itself. *Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 122 (4th Cir. 1995) (antitrust case recognizing that "affirmative acts" that *conceal* violation may also be *part* of violation).

When a wrongdoer has engaged in *active* concealment, there is disagreement concerning whether or not the victim is required to exercise due diligence to discover his claim.[26] As Judge Posner has pointed out, however, the disagreement, "may be apparent rather than real" because equitable tolling requires due diligence and "the cases often run equitable tolling and equitable estoppel together." *Wolin*, 83 F.3d at 852.

In addition to fraudulent concealment, *equitable estoppel* also includes conduct that, while not concealing the original fraud, wrongfully prevents the prospective plaintiff from suing in time, such as threatening plaintiff or promising not to plead statute of limitations as a defense. *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 347 (2d Cir. 1994). Equitable tolling differs from equitable estoppel because the wrongdoer, while responsible for the underlying wrong, is *not* responsible for the victim's delay in bringing suit. The victim is required to continuously exercise due diligence and, if he does not, he cannot invoke equity to avoid the time bar.

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[26] *Compare Robertson v. Seidman & Seidman*, 609 F.2d 583, 593 (2d Cir. 1979) ("the active concealment of fraudulent conduct tolls the statute of limitations in favor of the defrauded party until such time as he actually knew of the fraudulent conduct of the opposing party") *with J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1259 (1st Cir.) ("the fraudulent concealment doctrine will not save a charging party who fails to exercise due diligence, and is thus charged with notice of a potential claim"), *cert. denied*, 117 S. Ct. 81 (1996). *See also Wolin*, 83 F.3d at 852 (plaintiff's actual knowledge required); *Riddell*, 866 F.2d at 1491 (same); *Pinney Dock & Transp. Corp. v. Penn Cent. Corp.*, 838 F.2d 1445, 1465 (6th Cir. 1988) (burden of demonstrating due diligence rests on plaintiff).

Courts apply a "reasonable person" standard in this context. *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir. 1994). If a reasonable person in similar circumstances would not have been aware of the basis of the claim, equitable tolling is appropriate. *Id.* This is, of course, a fact-sensitive inquiry that will depend on the unique circumstances of each case. *See Jones v. Childers*, 18 F.3d 899, 909 (11th Cir. 1994).[27]

Equitable estoppel and equitable tolling are also distinguishable by the amount of time that they allow for a prospective plaintiff to bring the action. If equitable estoppel is established, plaintiff has the *full* statutory period in which to sue after the wrongful conduct had ceased to impede him. *Wolin*, 83 F.3d at 852-53. For equitable tolling, however, once the cause of action is discovered, plaintiff must bring suit as soon as he or she is reasonably able to do so. *Phillips*, 984 F.2d at 492. If the discovery rule is applied, the claim will be deemed to have accrued when the injury (or in some cases wrongdoing) is discovered and the plaintiff will have the full statutory period to bring suit. *Wolin*, 83 F.3d at 852; *Nevada Power*, 955 F.2d at 1307-08.

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[27] Equitable tolling is commonly applied in fraud cases because fraud is often difficult to discover, even when the wrongdoer makes no special effort to cover it up. *See Wolin*, 83 F.3d at 852 ("[U]nlike being hit over the head by a baseball bat wielded by a known assailant, fraud is secretive by nature."). Equitable tolling encompasses a broader range of conduct than equitable estoppel and it is generally appropriate when the circumstances that cause the plaintiff to miss a filing deadline are out of his or her hands. *Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993).

2. Genuine Issues Of Material Fact Relative To These Tolling Doctrines Should Have Precluded The Entry Of Summary Judgment In Favor Of Respondents

In granting summary judgment for Respondents, the district court incorrectly found that there was no fraudulent concealment because defendants did not take affirmative steps preventing discovery of the facts establishing the cause of action. 875 F. Supp. at 1350-51 & 1352 n.6. In affirming, the Eighth Circuit also presumed application of due diligence standards to Petitioners' fraudulent concealment claim, stating that "the Klehrs' lack of diligence precludes us from tolling the statute of limitations due to fraudulent concealment." 87 F.3d at 238. The purported lack of due diligence was also grounds for rejecting their equitable tolling claim. 87 F.3d at 239 n.11.

Summary judgment is improper "if tolling of the statute of limitations requires the resolution of disputed factual issues." *Aragon v. Federated Dep't Stores, Inc.*, 750 F.2d 1447, 1449 (9th Cir. 1985). Issues concerning fraudulent concealment and due diligence are inherently factual in nature and generally unsuited for resolution on summary judgment. *Hines v. A.O. Smith Harvestore Prods., Inc.*, 880 F.2d 995, 999 (8th Cir. 1989); *Durham v. Business Management Assocs.*, 847 F.2d 1505, 1509-10 (11th Cir. 1988). While Petitioners knew that they were encountering health problems with their cattle herd, a reasonable jury could conclude that Respondents' post-sale conduct was designed "to convince [the victims] that the defendant[s] ha[ve] not made any misrepresentations or misleading omissions, or otherwise to dissuade [them] from suing." *Wolin*, 83 F.3d at 852.

The courts below confused Respondents' concealment of the Harvestore's *design defects* with concealment of their *false representations*. While the silo (complete with design defects) may have been situated on Petitioners' property, the record demonstrates that Respondents took

extensive affirmative steps to conceal the false and misleading nature of their continuing representations to Petitioners and other purchasers.[28] The record does not irrefutably demonstrate that Petitioners discovered or should have discovered Respondents' fraudulent conduct earlier than they did, rendering summary judgment improper. *Cf. Nevada Power*, 955 F.2d at 1307-08 (even though plaintiff knew that defendant's 1979 representations were false, there was no reason to believe that they were anything other than innocent mistakes until 1988, when disclosure of defendant's internal documents demonstrated willfulness).

3. When The Wrongdoer Has Engaged In Fraudulent Concealment, The Victim's Lack Of Diligence Should Not Preclude Application Of Equitable Estoppel

When the wrongdoer has engaged in active concealment, a fraud victim's lack of due diligence does *not* preclude application of equitable estoppel. Once a trial court determines that fraudulent concealment has been demonstrated, equitable estoppel bars a defendant from invoking the statute of limitations. Fraudulent concealment concerns not the diligence of the plaintiff but the misdeeds of the defendant. *Wolin*, 83 F.3d at 852. As to whether the wrongdoer's fraudulent concealment contributed to the victim's lack of diligence, the victim – not the wrongdoer – should be given the benefit of the doubt.

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[28] It is wholly unrealistic to expect that Petitioners had the ability to and detect a design defect in a silo and, upon doing so, to deduce that the continuing representations made to them in connection with their purchase were wilfully false. Even if Petitioners could have made this deduction, Respondents' post-sale fraudulent statements repeated and reinforced (and thereby concealed) the false information that induced purchase of the silo in the first place.

Requiring due diligence of a victim of fraudulent concealment improperly focuses on the very vulnerabilities that made the victim the wrongdoer's prey in the first place. In equity, a wrongdoer should not be rewarded for choosing his victim well.

Accordingly, once a plaintiff raises a genuine issue of material fact as to fraudulent concealment, *defendants' burden is to demonstrate that plaintiff had actual knowledge of the cause of action beyond the limitations period. Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996).

4. In This Case, There Are Genuine Issues Of Material Fact Concerning Petitioners' Exercise Of Due Diligence

The record demonstrates that Respondents' fraudulent scheme was self-concealing and that application of equitable tolling is appropriate. If this Court addresses Petitioners' exercise of due diligence in the context of equitable tolling (or, if required, in the context of fraudulent concealment), it should find that summary judgment was inappropriate because a reasonable jury could find that Petitioners exercised due diligence in discovering the fraud.[29]

In addition, relying on Minnesota law, the lower courts placed the burden on *Petitioners* to demonstrate due diligence in the fraudulent concealment context and this analysis carried through to the Eighth Circuit's consideration of equitable tolling; however, "the burden of showing reasonable diligence [is on] the *defendant* when

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[29] Petitioners made routine repairs to the silo which did not reveal its design flaws. The owner's manual warned Petitioners not to go inside the silo because there was not enough oxygen to support life. Petitioners discovered that the silo was the cause of their injury in March 1991, when a university professor they had consulted conducted an investigation.

plaintiff alleges that the statute is tolled by a self-concealing wrong". *J. Geils Band*, 76 F.3d at 1259. Therefore, the burden concerning due diligence for equitable tolling purposes was placed on the wrong party.[30]

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[30] If, contrary to NASCAT's position, this Court holds that plaintiff must exercise due diligence when defendant has engaged in fraudulent concealment, it should, at a minimum, place the burden of establishing a lack of due diligence on *defendant*. Otherwise, the incongruous result might be that defendant has the burden of proof on plaintiff's *lack* of due diligence when there is *no* fraudulent concealment, but plaintiff has the burden demonstrating his or her due diligence when defendant has engaged in active concealment. *See J. Geils Band*, 76 F.3d at 1259. In other words, *there is a procedural advantage for the wrongdoer who engages in fraudulent concealment. Cf. Urland v. Merrell-Dow Pharm., Inc.*, 822 F.2d 1268, 1281 (3d Cir. 1987) (Becker, J., dissenting).

II. CONCLUSION

For the reasons stated herein, the decision of the court below should be reversed.

DATED: February 20, 1997

Respectfully submitted,

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